Sinodaya Industrial Gas Sdn Bhd v Astrol Hover Engineering Sdn Bhd and another appeal

HIGH COURT (SIBU) — CIVIL APPEALS NO 12–11 OF 2001 AND NO 12–10 OF 2001
CLEMENT SKINNER J
19 JUNE 2002

Civil Procedure *— Appeal — Summary judgment — Triable issues — Prima facie case — Verbal agreement — Burden of proof*

The plaintiff claimed that the defendant owed a sum of RM43,333 for a supply of oxygen and tylene gas despite demands being made to the defendant to pay the same. The plaintiff commenced an action in the sessions court and filed an application for summary judgment against the defendant. The plaintiff also had a second action in the sessions court involving the same issues but concerning a different defendant, wherein it similarly filed an application for summary judgment. The sessions court dismissed both the plaintiff's applications. The plaintiff appealed and both appeals were heard together.

Held, allowing the appeals with costs:

(1) An application for summary judgment made in the subordinate court under O 26A of the Subordinate Court Rules 1980 ('the SCR') is equivalent to an application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC'). Therefore, the same principles would apply (see p 359C); *Lim Goh Huat v Saw Keng See* [1998] 6 MLJ 600 followed.

(2) In an application for summary judgment under O 14 of the RHC, once a plaintiff complies with or satisfies the procedural requirements mentioned in the order, he has to establish a prima facie case for judgment against the defendant, upon whom the burden shifts, to satisfy the court why judgment should not be given against him (see p 359D–E); *Company for Foreign Trade v Kaya Raya Sdn Bhd* [1984] 2 MLJ 300 followed.

(3) The appellant's application for summary judgment came within the scope of O 26A of the SCR for several reasons. Firstly, the claim was not one in respect of which an application for summary judgment may not be made under O 26 r 1(2) of the SCR. It was not a claim based on slander, libel, malicious prosecution, false imprisonment, seduction or breach of promise or allegation of fraud. Secondly, the respondent had appeared on the return date of the summons to oppose the appellant's claim. Furthermore, the appellant's statement of claim had been served on the respondent and it had in fact filed a defence thereto. Finally, the affidavit in support of the appellant's application complied with the requirements of O 26 r 2(1) of the SCR in that it verified the facts upon which the claim was brought and stated that in the

deponent's belief there was no defence to the appellant's claim. Therefore, the appellants had established a prima facie case for judgment unless the respondent upon whom the burden had shifted could satisfy the court why judgment should not be given (see p 359E–I).

(4) The assertion that there was a 'verbal agreement' between the parties that there should be a set off was vague, imprecise and inconsistent with the contemporary documents issued by the respondent. The respondent's assertion that there was a verbal agreement to set off the amount owed to the appellant should be rejected, thereby rendering the issue not triable (see pp 361A–B, 362C); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 followed.

(5) A failure to file a reply to a defence can never in law amount to an admission of the matters pleaded in the defence. Therefore, there could be no question of the appellant attempting by its affidavit to make good any omission or defect in its statement of claim (see p 362E–F).

(6) The court would need to address the appellant's submission that the respondent's set off could not be pleaded as a decree, only if the assertion made by the respondent that there was an oral agreement to set off the amount due to the appellant had raised a triable issue. Furthermore, the court need not make any order for stay of execution as the respondent did not raise or assert any counterclaim in the action and that the respondent had not raised any argument in favour of it (see pp 362G–363A); *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 followed.

[Bahasa Malaysia summary

Plaintiff menuntut bahawa defendan masih terhutang wang sebanyak RM43,333 bagi pembekalan gas oksigen serta tylene walaupun tuntutan bayaran telah dibuat terhadapnya. Plaintif telah memulakan prosiding dalam mahkamah sesyen and memohon penghakiman terus terhadap defendan. Plaintif ada juga tindakan kedua dalam mahkamah sesyen melibatkan isu-isu yang sama tetapi berkenaan defendan yang lain, di mana plaintif telah juga memfailkan satu permohonan untuk penghakiman terus. Mahkamah sesyen telah menolak kedua-dua permohonan plaintif. Plaintif telah merayu dan kedua-dua rayuan telah didengar sekali.

Diputuskan, membenarkan rayuan-rayuan tersebut dengan kos:

(1) Permohonan penghakiman terus dalam mahkamah rendah di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('the KMR') sama dengan permohonan penghakiman terus dibawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('the KMT'). Oleh itu, prinsip-prinsip yang sama terpakai (lihat ms 359C); *Lim Goh Huat v Saw Keng* [1998] 6 MLJ 600 diikut.

(2) Dalam suatu permohonan bagi penghakiman terus dibawah A 14 KMT, sebaik sahaja plaintif menurut kehendak prosedural yang terkandung dalam aturan tersebut, ia menetapkan kes prima facie bagi penghakiman terhadap defendan. Beban bukti seterusnya ditanggung defendan bagi memuaskan mahkamah mengapa penghakiman tidak patut diberi terhadapnya (lihat ms 359D–E); *Company for Foreign Trade v Kaya Raya Sdn Bhd* [1984] 2 MLJ 300 diikut.

(3) Permohonan perayu untuk penghakiman terus dirangkumi skop A 26A KMR di atas beberapa sebab. Pertama, tuntutan plaintif bukannya suatu tuntutan di mana permohonan penghakiman terus tidak boleh di buat di bawah A 26A r 1(2) of the KMR. Ia bukannya suatu tuntutan berdasarkan fitnah, libel, pendakwaan niat jahat, penahanan salah, penggodaan ataupun pemungkiran janji atau tuntutan fraud. Kedua, responden telah hadir pada tarikh pengembalian saman bagi membantah tuntutan perayu. Lagi pun, pernyataan tuntutan perayu telah diserahkan ke atas responden yang telahpun memfailkan pembelaannya. Akhirnya, afidavit sokongan permohonan perayu telah mematuhi keperluan A 26A r 2(1) KMR memandangkan ia telah mengesahkan fakta yang menjadi asas tuntutan serta menyatakan kepercayaan deponen bahawa tiada pembelaan kepada tuntutan perayu. Oleh itu, perayu telah membuktikan kes prima facie bagi penghakiman melainkan responden, yang kini menanggung beban pembuktian, dapat memuaskan mahkamah mengapa penghakiman tidak patut diberi terhadapnya (lihat ms 359E–I).

(4) Tuntutan adanya persetujuan lisan antara pihak-pihak membenarkan tolakan adalah tidak jelas, tidak tentu dan tidak konsisten dengan dokumen semasa yang dikeluarkan oleh responden. Tuntutan responden adanya perjanjian lisan membenarkan tolakan dari jumlah yang terhutang kepada perayu harus ditolak, menjadikan isu tersebut tidak boleh dibicarakan (lihat ms 361A–B, 362C); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 diikut.

(5) Kegagalan menjawab kepada pembelaan tidak dapat dari segi undang-undang menjadi satu pengakuan perkara-perkara yang diplidkan dalam pembelaan. Persoalan samada perayu sedang cuba membetulkan sebarang peninggalan atau kecacatan dalam tuntutannya melalui afidavitnya tidak wujud (lihat ms 362E–F).

(6) Mahkamah perlu meneliti hujah perayu bahawa tolakan responden tidak dapat diplidkan sebagai dekri hanya jika tuntutan yang dibuat responden tentang wujudnya perjanjian lisan bahawa tolakan jumlah yang kena dibayar kepada perayu menimbulkan isu bagi perbicaraan. Mahkamah tidak perlu membuat perintah bagi penggantungan pelaksanaan memandangkan responden tidak menimbulkan atau menuntut sebarang tuntutbalas dalam tindakan dan responden tidak menimbulkan sebarang hujah ke

A atasnya (lihat ms 362G–363A); *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 diikut.]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 2001 B Reissue) paras 1230–1233.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (folld)
Lim Goh Huat v Saw Keng See [1998] 6 MLJ 600 (folld)
C *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (folld)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (folld)

Appeal from: Summons No SB–52–500 of 1998 and No SB–52–503 D of 1998 (Sessions Court, Sibu)

Legislation referred to

Rules of the High Court 1980 O 14
Subordinate Court Rules 1980 O 14 r 20(1), O 26A r 2(1)

E *Stephen Lu* (*SK Ling & Co*) for the appellant.
David HP Kuok (*Wong, Orlando Chua & Co*) for the respondent.

Clement Skinner J: This is the hearing of two appeals against the decision of the learned sessions court judge who, on 12 June 2001, dismissed the plaintiff's application for summary judgment against the defendant in each F of the above suits under O 26A Subordinate Courts Rules 1980 ('the SCR'). The appellant in both appeals are the same and as the appeals raise the same issues, counsel representing the appellants as well as the respondents in both appeals have agreed that only Civil Appeal No 12–11–2001 will be argued and the decision thereon will bind the parties in Civil Appeal No 12–10–2001.

G The facts appearing from the pleadings are that the plaintiff ('Sinodaya'), an incorporated company, sold oxygen and acetylene gas ('the goods') to the defendant ('Astrol Engineering') which is also an incorporated company. As at 1 December 1997, Sinodaya claimed that a sum of RM43,333 was owing to it by Astrol Engineering in respect of the H said goods and despite demands made on Astrol Engineering to pay the same, it had refused to do so. Accordingly, on 24 June 1998, Sinodaya commenced this action in the sessions Court, Sibu. Sinodaya's statement of claim pleaded the facts mentioned above in five numbered paragraphs.

Astrol Engineering filed a defence to Sinodaya's claim in which the I following facts were pleaded:

(a) it admitted that both Sinodaya and it are incorporated companies;

(b) it denied still owing Sinodaya the sum claimed, ie RM43,333;

(c) it then pleaded that the amount claimed by Sinodaya 'had been totally set off against the value of goods delivered and services rendered' to Sinodaya by it (Astrol Engineering) 'as verbally agreed upon by the parties' which it then set out to give particulars of. Those particulars show that the 'goods delivered and services rendered' to Sinodaya by Astrol Engineering consisted of various marine equipment and services amounting to RM82,676.20; A B

(d) it then also set off the sum of RM82,676.20 against the sum of RM41,477 which is the subject of Sinodaya's claim against Sterling Bay Sdn Bhd ('Sterling Bay') in another suit filed at the Sessions Court and which forms the other appeal being dealt with now, ie Civil Appeal No 12–10–2001. I pause to mention here that Sterling Bay is a subsidiary company of Astrol Engineering; C

(e) it pleaded that all the invoices (presumably for the goods and services allegedly rendered to Sinodaya) had been duly issued to one Mr Tang Tiew Yong, who was either the managing director or director or manager of Sinodaya 'as requested and/or directed'. D

Sinodaya then filed its application for summary judgment supported by affidavit affirmed by Mr Tang Tiew Yong in which he affirmed, inter alia, that:

(a) as at the commencement of this action, Astrol Engineering was justly and truly indebted to Sinodaya in the sum of RM43,333 and that the particulars of Sinodaya's claim appear by the indorsement on the summons: E

(b) that to his own knowledge the said debt was incurred and is still due and owing;

(c) that he verily believed that there is no defence to the action. F

Astrol Engineering then filed an affidavit to oppose the application for summary judgment. Its affidavit was affirmed by one Lau Chii Hieng, its managing director. In his affidavit Mr Lau simply repeated what was stated in the defence filed by Astrol Engineering. Nothing further was said, except that it 'was agreed' that the sum of RM82,676.20 was to be set off against the sum claimed by Sinodaya against Astrol Engineering and Sterling Bay (the subsidiary of Astrol Engineering). G

In response to the affidavit of Mr Lau Chii Hieng, Mr Tang Tiew Yong filed an affidavit in reply on behalf of Sinodaya in which he:

(i) denied that Sinodaya had received any goods allegedly supplied by Astrol Engineering; H

(ii) pointed out that the invoices for the goods allegedly supplied by Astrol Engineering were made out to his (Mr Tang's) name personally and not to Sinodaya;

(iii) denied there was any arrangement between Sinodaya and Astrol Engineering to set off what was allegedly owed by Sinodaya with what was owed to it by Astrol Engineering and its subsidiary, Sterling Bay. I

(iv) stated that what was allegedly supplied by Astrol Engineering could not amount to or constitute a set-off or defence in the action as the goods allegedly supplied had no connection whatsoever with the goods supplied by Sinodaya to Astrol Engineering.

It was on the basis of what is set out above that Sinodaya's application for summary judgment was heard and thereafter dismissed by the learned sessions court judge.

Being dissatisfied with that decision, the appellant brings this appeal. Before considering the merits of the appeal, I wish to set out the principles of law that guide both, a subordinate court as well as a High Court when dealing with an application for summary judgment.

The first is that an application for summary judgment made in a subordinate court under O 26A of the SCR is equivalent to an application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') and therefore, the same principles of law apply. This was stated by Abdul Kadir Sulaiman J (as his Lordship then was) in *Lim Goh Huat v Saw Keng See* [1998] 6 MLJ 600 at p 606 and it is a proposition with which I respectfully agree.

The second is that in an application for summary judgment under O 14 of the RHC, once a plaintiff complies with or satisfies the procedural requirements mentioned in the order he will have established a prima facie case for judgment against the defendant, upon whom the burden then shifts to satisfy the court why judgment should not be given against him. This principle was stated by the Federal Court in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300. Reverting to the appellant's application for summary judgment, I am satisfied that its case comes within the scope of O 26A of the SCR, in that:

(a) its claim is not one in respect of which an application for summary judgment may not be made under O 26A r 1(2) of the SCR ie it is not a claim based on libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage or allegation of fraud;

(b) the respondent had appeared on the return date of the summons, to oppose the appellant's claim;

(c) the appellant's statement of claim has been served on the respondent and it had in fact filed a defence thereto;

(d) the affidavit in support of the appellant's application complies with the requirements of O 26A r 2(1) of the SCR in that it verified the facts upon which the claim is brought and stated that in the deponent's belief there is no defence to the appellant's claim.

In my judgment, the appellant having satisfied the requirements for summary judgment under O 26A of the SCR, it had established a prima facie case for judgment unless the respondent, upon whom the burden had shifted, could satisfy the court why judgment should not be given.

Now, that is a question which falls to be decided in accordance with the principle stated by the Supreme Court for the guidance of the High Court

in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408, where the court in dealing with an appeal from a decision made on an application for summary judgment under O 14 of the RHC, stated the following principle to be applied by a judge in determining whether an issue raised by a defendant is or is not triable. This is what his Lordship Mohamed Azmi SCJ said on the matter:

> ... The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the *Privy Council on Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 had this to say at p 217:
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> > 'Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.'
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> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

With the above principle placed at the forefront of my mind, I now turn to consider whether the respondent had raised any issues worthy of further investigation at a trial.

To resist the appellant's application for summary judgment, the respondent filed an affidavit in opposition affirmed by Mr Lau Chii Hieng. I have already said what is stated in his affidavit. Basically, Mr Lau makes the following assertions:

(1) that the respondent 'no longer owes' the appellant in this action as well as the other action which forms the other appeal before the court. This is stated in para 8 of his affidavit;

(2) that the reason why nothing is owed to the appellant in this suit and in the other suit is because the amount claimed by the appellant 'has been totally set off against the value of goods delivered and services rendered to the plaintiff (appellant) by the defendant (respondent) as verbally agreed upon by the parties.' This is stated in paras 5 and 6 of his affidavit; and

(3) that all the invoices (presumably for the goods delivered and services allegedly rendered by the respondent to the appellant) were issued to Mr Tang Tiew Yong, the managing director of the appellant 'as requested and/or directed.' This is stated in para 7 of his affidavit.

So, do these assertions of the respondent raise triable issues? In my judgment they do not and I say so for the following reasons.

With regard to the assertion that there was a 'verbal agreement' between the parties that there should be a set off, I find this assertion vague and imprecise. It is also inconsistent with the contemporary documents issued by the respondent ie the invoices. Bearing in mind that both the appellant and the respondent are corporate entities and therefore can only act through their officers or agents, and further bearing in mind that it is alleged that the agreement to set off was made 'verbally', it must have been made between two persons. Yet, even though the respondent was faced with an application for summary judgment, it has not been able to state certain basic facts, such as, between whom this verbal agreement was made and where and on what date it was made so that the court could, at the very least, determine whether the person or persons concerned were connected with the appellant and the respondent and if so, in what capacity so that the court could at least say that sufficient facts had been raised in support of the assertion which warrant further investigation at a trial. But here, the respondent has raised nothing of that sort.

I should point out, however, that in his written submissions, counsel for the respondent stated that 'there is an agreement between the respondent and the appellant through his (sic) managing director, Mr Tang Tiew Yong that the total sum of RM82,676.20 was to set off the sum of RM43,333 claimed in this case and another action...' I regret that even a careful reading of the defence filed as well as the whole of Mr Lau's affidavit does not show this submission to be correct. Nowhere in either of these documents is it stated that the verbal agreement was made with the appellant 'through his (sic) managing director Mr Tang Tiew Yong.' The submission made by counsel amounts to tendering oral evidence from the Bar and must be rejected. It is also worth pointing out that nothing is said about who in the respondent, Mr Tang is alleged to have reached the verbal agreement with. I also find that the invoices which the respondent relies upon in support of its alleged verbal agreement of a set off, does not support its assertion because nowhere in those invoices is there any indication that the value of the goods or services mentioned therein, were being raised in the invoice concerned by way of a set off against what was owed to the appellant.

With regard to the assertion that all the invoices of the respondent were issued to Mr Tang Tiew Yong, the managing director of the appellant 'as requested and/or directed', I do not see how this assertion can raise a triable issue or even support the respondent's assertion that there was a verbal agreement to set off the appellant's claim. The assertion is both equivocal and imprecise, in that, Mr Lau does not say who, if at all, in the appellant company requested and/or directed that the invoices be issued in the name of Tang Tiew Yong? The court is left guessing as to who it was who is alleged to have done so. And the fact that the invoices were issued in the name of Mr Tang Tiew Yong does not mean that the goods were supplied and the services were rendered to the appellant as alleged because it is equally consistent with the fact that the goods were supplied and services rendered to Mr Tang Tiew Yong personally and not the appellant company

at all. That this could be so is borne out by a perusal of the invoices relied on by the respondent. They show:

(i) that every invoice was made out to Mr Tang Tiew Yong personally and never as 'managing director or director or manager' of the appellant;

(ii) the goods and services which are mentioned in these invoices are marine related items, such as for example, marine water tight doors, fabrication of anchor winchlass and they were delivered or rendered to 'Yong Hin' or Mr Tang Tiew Yong or 'Yong Hin Shipyard', and not to the appellant. Thus, the respondent's own documents contradict its assertion.

For all the above reasons, the respondent's assertion of there being a verbal agreement to set off the amount owed to the appellant must be rejected, thereby rendering the issue not triable. With it, the denial that it owes any money to the appellant must also fall.

In the course of submissions, counsel for the respondent took a point of pleading: he said that after the respondent had filed its defence in which it raised the plea of set off, the appellant did not file a reply to traverse and/or rebut the allegation of set off and so must therefore be taken to admit that there was an agreement to set off between the parties. I regret I find no merit in this contention. The short answer to the respondent's submission is that a failure to file a reply to a defence can never, in law, amount to an admission of the matters pleaded in the defence because O 14 r 20(1) of the SCR expressly states that:

> If no reply to a defence is ordered, there is an implied joinder of issue on that defence.

Accordingly, there can be no question of the appellant attempting by its affidavit to make good any omission or defect in its statement of claim, as alleged by counsel for the respondent.

It follows from what I have said so far that the appellant is entitled to have this appeal decided in its favour. There are, however, two matters which I wish to deal with before concluding. First, counsel for the appellant submitted that the set-off which the respondent asserted cannot be pleaded as a defence in this action because the matter sought to be set off by the respondent is not connected with nor forms part of the matter upon which the appellant's action is founded (see *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 at p 161). I find that I do not need to address this submission for the reason that it is only if I found that the assertion made by the respondent that there was an oral agreement to set off the amount due to the appellant raised a triable issue, that I would need to go one step further to consider whether such an issue or defence could be maintained as a set off.

The second matter I wish to deal with is the submission of counsel for the appellant that if I allowed the appeal and granted judgment in favour of the appellant, I should grant a stay of execution of the judgment because it

A seems 'the respondent's counterclaim is not less than the appellant's claim'. I do not think I need to make any such order for stay. In the first place, the respondent did not raise or assert any counterclaim in this action. In the second place, counsel for the respondent has not raised any argument in favour of it.

B In the result, I allow these appeals with costs. I accordingly set aside the decision of the learned sessions court judge and order that judgment be entered for the appellant in this appeal as well as the appellant in Civil Appeal No 12–10 of 2001, in terms of their respective applications for summary judgment.

C *Appeals allowed with costs.*

Reported by Hanim Kamaruddin

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